In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2042

PETER FICORELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a subpoena demanding the production of certain records, required by state law to be kept, violated the privilege against self-incrimination.

On June 21, 1973, the United States District Court for the Eastern District of Michigan issued a grand jury subpoena *duces tecum* to Leonard Ciaffone, president of Mid-City Realty Company, a sole proprietorship owned by petitioner, Peter Ficorelli. The subpoena ordered the production of escrow records of the company; the records reflected down payments made by prospective purchasers of homes the mortgages on which were to be insured by the Federal Housing Authority (FHA). State law required these records to be maintained.[1] Ciaffone did not produce the records, and N.C. Deday LaRene, the attorney for

---

[1]That law, Mich. Stat. Ann. § 19.803 (Supp. 1973), is part of a general scheme of regulation of the Michigan real estate industry. See, *e.g.*, Mich. Stat. Ann. §§19.791-19.809.

the company, indicated that he would assume custody of the records until the issue concerning the propriety of the subpoena was resolved. Subsequently, a subpoena for the records was served upon both the attorney and petitioner. At a hearing on July 6, 1973, petitioner argued that compelling production of the escrow records would violate his Fifth Amendment privilege against self-incrimination. This position was rejected by the district court, which issued an order directing compliance with the subpoena. Petitioner did not comply, and on July 16, 1973, he was adjudged in civil contempt and directed to pay one hundred dollars for each day that he persisted in his refusal. This order was stayed pending decision on appeal. The court of appeals affirmed (Pet. App. A).

1. Petitioner argues that compelling production of the requested escrow deposit records would violate his Fifth Amendment privilege against self-incrimination. This contention is at variance with this Court's "required records" decisions. "[T]he privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.' " *Shapiro* v. *United States*, 335 U.S. 1, 33,[2] (citing *Davis* v. *United States*, 328 U.S. 582, 589-590).

Shapiro created a rule, elaborated in subsequent cases (see, *e.g.*, *Marchetti* v. *United States*, 390 U.S. 39, 56-57), under which the government may require "the keeping

---

[2]The defendant in *Shapiro*, a produce wholesaler, had been required under war-time price control laws to maintain records of all sales and to provide these records on request to the Office of Price Administration. Accordingly, while claiming a privilege against self-incrimination, he obeyed a subpoena from the Price Administrator requesting such records. A prosecution for violation of price control laws was subsequently instituted and this Court rejected the argument that the record maintenance requirements of the price control laws violated the Fifth Amendment.

of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself" (335 U.S. at 32). Records may be so used if they meet three criteria: First, the records required must be of a type customarily maintained; secondly, the records must constitute material having a "public aspect," that is, there must be "a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned * * *" (*ibid.*); finally, the requirements must be imposed pursuant to a generally regulatory, as opposed to criminal investigatory, scheme of legislation.

Petitioner's records satisfied these criteria.

(a) Escrow deposit records of home purchasers are ordinarily maintained by real estate organizations.

(b) Real estate transactions are an activity properly subject to governmental regulation in order to ensure the financial safety of those who purchase or sell real estate, and thus the records required here have a "public aspect."

(c) Although criminal penalties for failure to maintain the records are provided, the thrust of the legislation, as the court below observed, "is regulatory, non-criminal, in nature" (Pet. App. 18).

Petitioner argues that his escrow records, although required to be maintained, nonetheless do not have a public aspect because the public in general does not have access to the records and because such records may be used only for the purpose of licensing and regulation. However, it is a misreading of *Shapiro* to interpret "public aspect" as meaning that the records involved must be open to the public in general; "public aspect" denotes only that the

activity is one reasonably subject to governmental regulation. There is no basis for petitioner's assertion (Pet. 9) without citation that cases following *Shapiro* have "provided for eventual public inspection of the documents." Nothing in *Shapiro* indicated that the records subject to inspection by the Price Administrator were accessible to the public. Similarly, every individual is required to file an income tax return (see *United States* v. *Sullivan*, 274 U.S. 259), but such a record can hardly be deemed accessible to the public.

2. Contrary to petitioner's suggestion, *Marchetti* v. *United States, supra*,[3] did not constrict the "required record exception" test articulated by *Shapiro*. In *Marchetti* the Court held that a defendant charged with failing to comply with certain federal gambling laws, which required him to provide records of his gambling activities in order that special taxes might be assessed, might properly assert the privilege against self-incrimination as a justification for his non-compliance. The Court distinguished *Shapiro*, noting that the gambling records required were not of a type ordinarily maintained and that the legislation, rather than constituting a general regulatory scheme, was directed at a " 'selective group inherently suspect of criminal activities' " (390 U.S. at 57, citing *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79) and was primarily intended to aid criminal prosecution of such activities.

3. Nor is there merit to petitioner's attempt to restrict *Shapiro* to circumstances in which the disclosure of incriminating records is initially mandated by the particular agency exercising regulatory control over the matters

---

[3]See also *Grosso* v. *United States*, 390 U.S. 62; *Haynes* v. *United States*, 390 U.S. 85.

reflected by the records. Records required to be maintained by one governing entity have frequently been obtained by the prosecutorial branch of another sovereignty. See *United States* v. *Silverman*, 449 F. 2d 1341 (C.A. 2); *Application of Nadelson*, 353 F. Supp. 971 (S.D. N.Y.).[4] Petitioner's contention that he cannot be deemed to have "waived" his privacy rights to the federal government, but only to the state government (Pet. 12), does not assist him. The required records exception of *Shapiro* is not based upon a fictitious waiver of privacy, but upon the theory that particular areas of enterprise are properly subject to governmental regulation, and that required records of these enterprises are not private matters to which the Fifth Amendment applies. Given the legitimate presence of a program of governmental regulation, whether state or federal, records maintained pursuant to such a program never acquire a private character and thus cannot be withheld on Fifth Amendment grounds.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

---

[4]In *Silverman*, an income tax evasion prosecution, the prosecution established the defendant's gross income by using closing statements filed with the Appellate Division of the New York Supreme Court. These statements showed the amount of compensation received by an attorney in contingent fee cases and were required to be filed under New York State law; they were subject to disclosure only upon approval by the Presiding Justice of the Appellate Division. In *Nadelson*, the court refused to quash a subpoena requiring the subject's records relating to his process serving business, which were maintained as required by the New York City Department of Consumer Affairs.